

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

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74-2556

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

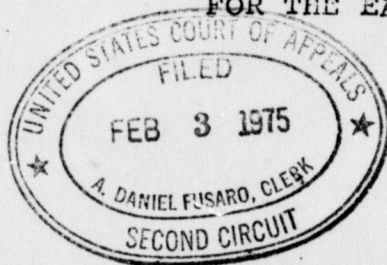
JOHN DOE, a/k/a
JUANITO CANCELA-CASTILLO,

Appellant.

Docket No. 74-2556

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the prosecutor's summation, in which he
called appellant a liar, was prejudicial, and requires re-
versal.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jack B. Weinstein) rendered November 26, 1974, convicting appellant Canela-Castillo of one count of fraud and misuse of a visa, in violation of 18 U.S.C. §1546 and sentencing him to two years incarceration.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

The prosecutor, in his opening statement, stated that he thought the jury would be "justified" in finding the defendant guilty (5).*

The Government began the presentation of its case with the testimony of John Greene, an immigration inspector at Kennedy Airport (12). Greene testified that on October 15, 1974, he was stationed at the "primary area" of the immigration station at Kennedy. The "primary area" is the line of desks at which persons entering the country must present their passports and visas for initial inspection (13-15).

* Numerals are references to the transcript of the trial.

On that date, the defendant approached Greene's desk and presented his "entry document" and passport (16). Because the defendant did not appear to Greene to be thirty-seven, the age indicated by the birth date in the passport, Greene sent him to the "secondary area" for closer examination (16-20).

Kathleen Thompson, the immigration inspector who examined the defendant at the "secondary area," was the next Government witness. She testified that when the defendant presented his documents to her, she noticed that the "3" in the "1937" birth date appeared to have been altered (28). She further noted that the page of the passport containing the defendant's passport photograph contained two impressions of the validating seal, whereas the photograph glued to that page contained only one impression of the seal (29-31). She further noted that the birthdate listed in the passport was June 18, 1937, whereas the birthdate listed on the defendant's identity card was November 18, 1937 (28, 36).

The Government's next witness was Donald Mooney, a fingerprint expert, who testified that the fingerprints entered on the passport were not the same as the defendant's fingerprints (39-41).

Thomas Donovan, a handwriting expert, testified that the signatures on the defendant's handwriting exemplars were not the same as the signature on the passport (46). He also testified that the "3" in the passport birthdate was originally a "5" (89).

Evelyn Wythe, a vice-consul for the United States in Santo Domingo, testified that she had issued the visa attached to the passport confiscated from the defendant (56).

Cancela-Castillo testified in his own behalf, stating that he was Juanito Cancela-Castillo, that the passport and other documents which he had presented to immigration officials belonged to him, and that he had obtained them from appropriate officials in the Dominican Republic (95-135).

Jose Cava also testified for the defense, stating that he had met the defendant in Santo Domingo, had known him as "Juanito" and had invited him to come to New York (136-41).

The prosecutor, in his summation, stated that he thought the defendant was lying when he testified (159), that he thought that the passport was a "phoney" (160), that he thought it was "very clear" that the person who had obtained the passport was not the defendant (163), and that

"the Government" was convinced that the defendant obtained the visa after it was issued to someone else (163). The Assistant went on to state that he thought the defendant "knows very well what he did" (165), that

The defendant, unfortunately, I think, has lied several times to people in this country,

(166)

that he thought the defendant "lied to the people at the airport" (166), that he thought the defendant "lied again . . . at Immigration Headquarters, and I think unfortunately, he lied to all of us when he took the stand today" (166).

At this point, the Court interrupted, stating:

You understand, what counsel thinks is not important, what you think is. He is just suggesting what you should think. His thoughts are of [no] importance on this point.

The prosecutor then concluded his summation stating:

He [the defendant] picked up a phony cedula, and he tried to come into the United States, knowing he was impersonating somebody else.

There is no other logical conclusion that you can draw from all the evidence.

(167)

After its charge, the Court, in response to defense counsel's objection to the Government's summation, further instructed the jury:

THE COURT: You have heard all the evidence in the case. Any fact the Government attorney said that the defendant is lying should not be given any weight except as the evidence supports that. There is nothing that the Government attorney knows that you don't know; is that clear? Decide the case on the evidence, not on what somebody else thinks.

(174-5)

After deliberating, the jury convicted the defendant of the single count charged.

ARGUMENT

THE PROSECUTOR'S SUMMATION
IN WHICH HE CALLED APPELLANT
A LIAR WAS PREJUDICIAL AND
REQUIRES REVERSAL.

The prosecutor's repeated expressions of his own opinion concerning the defendant's veracity and guilt constituted misconduct requiring reversal of the defendant's conviction. Such statements are clearly improper. United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970); Greenberg v. United States, 280 F.2d 472 (1st Cir. 1970); American Bar Association, Canon of Professional Ethics, Rules 15,22.

Here, the prosecutor asserted six times that he believed appellant was lying, thus expressing his own belief in appellant's guilt. This Court has been unequivocal

in its statements that such conduct is improper.

. . . Our study of the record discloses that the prosecutor charged twice that White was "lying" and repeatedly indicated that the defense was "fabricated." These tactics were unwise and unnecessary. Although we might expect a character in a Perry Mason melodrama to point to a defendant and brand him a liar, such conduct is inconsistent with the duty of the prosecutor to "seek justice, not merely to convict." ABA Code of Professional Responsibility, Final Draft, 1969, Ethical Consideration 7-13, at 79. See H. Drinker Legal Ethics 148 (1953).

United States v.
White, 486 F.2d 204,
206 (2d Cir. 1973).

See also United States v. Bivona, 487 F.2d 442, 445-6, (2d Cir. 1973).

The prejudicial effect of this conduct is emphasized by the short span of this two-day trial and the close proximity between the evidence and the summation. United States v. White, supra, 486 F.2d at 206.

Further, in this case appellant did not acknowledge his guilt (contrast United States v. White, supra, 486 F.2d at 207), so that what the prosecutor was in effect doing was expressing his belief in the soundness of his own case. Nor was there defense provocation for the prosecutor's attack on the appellant. In fact, defense counsel was care-

ful to argue only the deficiencies in the Government's proof, presenting the position that the witnesses might be mistaken and eschewing any notion that they were lying. Contrast United States v. DeAngelis, 490 F.2d 1004 (2d Cir. 1974); United States v. Bivona, supra.

This Court has often enough made known the principles which govern the prosecutor's behavior. Nonetheless, the prohibited conduct reappears with frequency. Here, that behavior must have resulted in undermining the jurors' deliberative process, and reversal is required.

CONCLUSION

FOR THE ABOVE STATED REASONS,
THE JUDGMENT BELOW SHOULD BE
REVERSED AND REMANDED FOR A
NEW TRIAL.

Respectfully submitted,

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Certificate of Service

5/3/75, 19

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

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